No. 626

IN THE

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FOR THE NINTH CIRCUIT.

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E. C. EVANS,
or review of a decision of the Board of United States General Appraisers, dated October 24, 1899, as to the duty to be paid on certain Anthracite Coal.

BRIEF FOR APPELLANT.

SMITH & PRINGLE,
Attorneys for Appellant.

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BRIEF FOR APPELLANT.

The question of this suit is whether a cargo of antharacite coal, containing less than ninety-two per cent of fixed carbon, should have paid duty, or should have been admitted free. It is the same question as was submitted to this Court in the case of Coles, reported in 100 Fed. 442, on appeal from the judgment of the Circuit Court, whose decision is reported in 93 Fed. 954.

The decision of this Court in the Coles case was rendered on February 5th, 1900, and was necessarily framed in ignorance of the conclusions arrived at by the Supreme Court of the United States in the case of *Chew Hing Lung* vs. *Wise*, in which the opinion was filed on January 22nd, 1900, and is to be found in 176 U. S. 156.

A petition for rehearing of the Coles case was filed in this Court, calling attention to the effect of the decision in the Chew Hing Lung case upon the questions involved in the Coles case, and was denied. Subsequently a petition for a writ of *certiorari* in the Coles case was filed in the Supreme Court of the United States, and was denied. (177 U. S. 695.)

In spite of the denial of the petitions for a rehearing and for a writ of *certiorari* in the Coles case, we now again bring before this Court the question of that case, and particularly the question of the bearing upon this Court's decision in that case of the Supreme Court's rulings in the Chew Hing Lung case.

We do this with our eyes open to the preliminary objection that may be made by opposing counsel, or by the Court itself, to the effect that the bearing of the Chew Hing Lung decision upon the Coles case was fully presented to the Supreme Court upon the application for the writ of *certiorari*, and to this Court in the petition for a rehearing; that the question should be considered as set at rest by the denial of those petitions;

and that this Court should not be again troubled with the discussion of a question, which it has once considered and decided.

But the denial of the petition for the writ of *certiorari* cannot be considered as determinative of anything except that the petition did not present a case in which a writ should issue. This probably did not depend upon any view taken by the Supreme Court touching the merits of the question of law presented by the petition, and the Court might very well have declined, and probably did decline, to consider the question at all, basing its refusal of the writ solely upon the consideration that the case was not one of grave general public importance, or one of a conflict of decision between two Circuit Courts of Appeal, or one affecting the interests of this nation in its internal or external relations, and so not within the narrow limitations which the Court has set upon the exercise of its power to grant the writ.

American Const. Co. vs. *Jacksonville Railway*, 148 U. S. 383;

Forsyth vs. *Hammond*, 166 U. S. 514.

The result of the refusal of the writ was simply to leave this Court as the Court of last resort, from which there is no appeal, even if this Court should be opposed in opinion and decision to the Supreme Court. It renders it all the more incumbent upon this Court, as we beg leave to respectfully suggest, to harmonize its decisions with the rulings of the Supreme Court, be-

cause for any error committed by this Court in ruling in a way which would not be approved by the Supreme Court there is no redress whatever.

Nor do we consider that the question of the effect of the decision in the Chew Hing Lung case upon the conclusions arrived at by this Court in the Coles case is set at rest by this Court's refusal of a rehearing in the latter case. For it is to be observed that it is a question which was not and could not have been *argued* before this Court, and that its presentation in and consideration upon a mere petition for a rehearing is not the equivalent of a discussion orally and by brief or of a decision made after such a discussion. With great respect we submit that, the Supreme Court having, after the decision in the Coles case was written, rendered a decision distinctly overruling nearly every one of the positions taken by this Court as a basis for its judgment in the Coles case, we are entitled, as a matter of pure right, to present and fully argue *de novo* the question involved in that case in the light thrown upon it by the Chew Hing Lung case. And we are the more strenuous in this insistence for the reason that the principal question now remaining, and hereinafter fully discussed, namely, whether the phrase "all coals "containing less than ninety-two per centum of fixed "carbon" is a descriptive phrase or a special provision, was never argued by counsel in the Coles case, nor remotely alluded to in the opinion rendered by this Court, nor more than touched upon by the petition for

a rehearing.

With this preface we proceed to the argument, and ask the Court first to review with us the history of the tapioca case of Chew Hing Lung, so that we may see the precise position in which the matter is left by the final determination of the Supreme Court.

That case arose under the tariff act of 1890 (26 Stats. 567), which provided (sec. 2, p. 602) that "on "and after the sixth day of October eighteen hundred "and ninety, unless otherwise specially provided for "in this act, the following articles when imported "shall be exempt from duty" and named (par. 730) tapioca as one of such articles.

The duty list (par. 323) imposed a duty upon "all "preparations, from whatever substance produced, fit "for use as starch".

It was held by the Circuit Court of the Ninth Circuit (*In re Wise*, 77 Fed. 734), that the dutiability of some tapioca imported into this port was a question of fact, namely, whether it was or not in fact fit for use as starch, and, following the decision of the Circuit Court of Appeals for the Second Circuit regarding an importation of tapioca into the port of New York (*In re Townsend*, 56 Fed. 222), that it was not, as a matter of fact, fit for use as starch, and was therefore exempt from duty. On appeal to this Court (83 Fed. 162) this Court held, as a matter of *fact*, that the imported article was fit for use as starch, and, as a matter of

law, that it was therefore specially provided for under par. 323. Recognizing the general rule that "in tariff " legislation the designation of an article *eo nomine* " must prevail over a general description that would " otherwise embrace it ", the Court cited *Magone* vs. *Heller*, 150 U. S. 70, as authority for the proposition that " a name under which an article is commercially " known will not control a specific provision respecting " it ", and, following that case, in which it was held that the phrase " expressly used for manure" was a specific provision which controlled the denominative mention of "sulphate of potash", decided that "fit for use as starch " was likewise a specific provision which controlled the denominative mention of tapioca. Necessarily and expressly the decision of this Court was based upon a construction of the statute of 1890 to this effect: tapioca is exempt from duty unless otherwise specially provided for; the clause concerning all preparations fit for use as starch is a special provision for all tapioca coming within its terms. Following this construction, the argument might have been thus syllogistically stated: All preparations fit for use as starch including tapioca must pay duty; but the imported article is tapioca fit for use as starch; therefore, the imported article must pay duty.

Reviewing this decision in *Chew Hing Lung* vs. *Wise*, 176 U. S. 156, the Supreme Court came to some conclusions diametrically opposed to those of this Court in the tapioca case, and, as we shall see, also dia-

metrically opposed to the conclusions of this Court in the Coles case.

Differing from this Court, and reversing its judgment, the Supreme Court held, as a matter of law (p. 159), that, assuming the imported article to be fit for use as starch, still it was not specially provided for by par. 323; that the phrase "fit for use as starch" is a descriptive one, which, under the general rule, must yield to the designation of an article *eo nomine*, and not a specific provision like the phrase "expressly used for manure", which figured in *Magone* vs. *Heller*.

We have said that this decision was not to be reconciled with the decision of this Court in the Coles case. To ascertain whether this is so or not requires a closer view of both decisions.

The ultimate conclusion of this Court in the Coles case was that anthracite coal containing less than ninety-two per cent of fixed carbon is specially provided for by par. 415 of the *Dingley Act* (30 Stats. 151), and is not to be classified under the denominative mention of anthracite in the free list (par. 523). Just as this Court had held *in re Wise* that "all preparations fit for use as starch" was a special provision applicable to tapioca coming within its terms, so it held that "all coal containing less than ninety-two per "centum of fixed carbon" was a special provision applicable to anthracite coming within its terms.

The argument of the Court leading up to this con-

clusion may be thus syllogistically stated: All coal containing less than ninety-two per cent of fixed carbon must pay duty; but the imported article is coal containing less than ninety-two per cent of fixed carbon; therefore, the imported article must pay duty.

It had been argued for Coles, the importer, that the logical method of reading the two clauses of the statute together, in view of the general rule regarding the controlling effect of a denominative mention of an article over a general description which might otherwise include the designated article, was to regard the article specially mentioned *eo nomine* as an exception to the general description. In this view the Court was asked to read the statute as if it were written: all coals containing less than ninety-two per cent of fixed carbon, except anthracite, must pay duty.

But this Court regarded this suggestion as an attempt to "amend" par. 415, and declined to adopt the suggestion. The principle of construction thus contended for by the importer and rejected by the Court was, however, the very one adopted by the Supreme Court in the case of Chew Hing Lung (p. 159). There the Court, assuming that tapioca flour is, within the general description of the duty list, fit for use as starch, remarked that, "yet, by virtue of " paragraph 730, tapioca is placed on the free list, and " the substance tapioca flour, being tapioca in one of " its forms, is *excepted* from the general language of " paragraph 323, and is entitled to free entry. It is so

" excepted, because although assuming it to be fit for " use as starch, it is nevertheless tapioca, and tapioca " is in so many words put on the free list. Effect is " thus given to the general language of the paragraph " concerning starch and all preparations fit for use as " such, *excepting* therefrom the one article specially " named in paragraph 730, to which effect is given by " allowing the *exception*". And the Court pointed out that this method of construction is only an application and expression of the rule that the designation of an article, *eo nomine*, either for duty or as exempt from duty, must prevail over words of a general description, which might otherwise include the article specially designated.

If this Court had in the Coles case followed this rule of construction so unhesitatingly adopted by the Supreme Court, it would have held that, although the imported article was coal containing less than ninety-two per cent of fixed carbon, and so included in the general terms of the duty list, it was nevertheless anthracite, which is, in so many words, put on the free list. Effect would thus have been given to the general language of the paragraph concerning coals containing less than ninety-two per cent of fixed carbon, excepting therefrom the one article specially named in paragraph 523, to which effect would have been given by allowing the exception.

It was further argued for the importer in the Coles case, that this rule of construction, which treats a de-

nominative designation as an exception to the terms of a general description, was not to be affected by the presence in par. 523 of the words "not specially provided for in this act"; that these words must be taken literally and could only be satisfied by a provision elsewhere in the act specially applicable to anthracite; that the general description of "all coals containing " less than ninety-two per centum of fixed carbon" was not a provision specially applicable to anthracite, but the reverse; that there was nowhere outside of the free list a provision specially applicable to anthracite or any provision which could gratify these words in par. 523; and that therefore the words should be disregarded in the construction of the act.

The argument was disposed of by this Court by a reference to the fact that the duty list applied to "all coal", which the Court held to be a term "*comprehensive* " enough to include anthracite as well as any other " kind of coal, whether specifically named or not". The duty list was therefore held to answer the call of the free list for a specific provision applicable to anthracite, not because it was *specific* enough, but because it was *comprehensive* enough to include anthracite. This would seem to be a distinct violation of the general rule of construction that the comprehensive must yield to the specific, and is in direct opposition to the ruling of the Supreme Court in the Chew Hing Lung case on the precise point.

The phrase there considered, "*all* preparations, from

" whatever substance produced", was quite as comprehensive as the phrase "all coal". No phrase, indeed, could be more comprehensive, and yet the Supreme Court held that it must yield to the denominative mention of tapioca, although the latter was coupled with the expression "unless otherwise specially pro-" vided for in this act", with which the free list began, and which therefore was to be read into every clause and line of the free list with all the force which it would have had if actually written after it in each clause.

This Court treated these words as a *qualification* of the denominative designation of anthracite, saying: "An-" thracite coal is, it is true, specifically named; but it " is to be admitted free, subject to the qualifying " clause, 'not specially provided for in this act'. This " materially changes the meaning that might other-" wise be attributed to it if this qualification had not " been added".

The Supreme Court, on the contrary, held that the presence in the free list of the words "unless otherwise " specially provided for in this act", instead of qualifying or weakening the denominative designation of tapioca, "*strengthened* the argument that tapioca flour, " being in fact tapioca in one of its well known forms, " was exempt from duty, because in order to be exempt " the article must be otherwise specially made dutiable. " It is not so made dutiable, and is therefore by the " clear provision of the act made free of duty". It was

urged upon the Supreme Court, that tapioca flour was otherwise specially provided for in the act by par. 323, but as to this the Court said:

> "We cannot concur in this view. Tapioca flour is not otherwise specially provided for in par. 323. It is not mentioned specially nor is it named at all in that paragraph, which uses only general language relating to starch and all preparations from whatever substance produced, fit for use as starch. If tapioca flour be such a preparation it would be included in that general description if not otherwise exempted. But there is no special provision for tapioca flour, making that substance, in terms, dutiable under that paragraph, while in the free list there is a special designation of tapioca, and tapioca flour is tapioca".

It is thus seen that the Supreme Court followed the very line of argument urged upon this Court in the Coles case, and held, in spite of the very comprehensive language of the duty list, which included tapioca flour, because tapioca flour was a preparation fit for use as starch, that the words "unless otherwise specially pro-" vided for in this act", prefacing the free list, could only be satisfied by a provision specially applicable to tapioca flour, in the literal sense, and could not be and were not satisfied by a general clause comprehensive enough to include tapioca flour.

If this Court had in the Coles case adopted the view taken by the Supreme Court, it would have held that the words "not otherwise specially provided for by this act", with which the denominative mention of anthracite in the free list is coupled, so far from being a

qualification of the denominative mention of anthracite, *strengthens* the legislative declaration that anthracite shall be free from duty, by distinctly and positively adding that this shall be so unless anthracite is somewhere else in the act specially subjected to duty; and that anthracite is not otherwise specially provided for n par. 415, because it is not mentioned specially nor is it named at all in that paragraph, which uses only general and comprehensive language relating to coal containing less than ninety-two per cent of fixed carbon. This Court would have said: there is no special provision for anthracite coal containing less than ninety-two per cent of fixed carbon, making that substance, in terms, dutiable under par. 415, while in the free list there is a special designation of anthracite, and anthracite containing less than ninety-two per cent of fixed carbon is anthracite.

It thus appears that the reasons for this Court's decision in the Coles case, were the following:

FIRST. It would be an unwarranted amendment to the statute to read it as if anthracite were excepted from par. 415.

SECOND. The expression "all coal" in par. 415 is comprehensive enough to include anthracite.

THIRD. The words "not otherwise specially provided for in this act" are a qualification of the denominative designation of anthracite in par. 523.

FOURTH. Par. 415 is a special provision for an-

thracite containing less than ninety-two per cent of fixed carbon.

These were the only questions discussed in the opinion of this Court. Similar questions were discussed by the Supreme Court in the case of Chew Hing Lung, and as to each and all of them the Supreme Court took a view and rendered a conclusion utterly opposed to the views and conclusions of this Court. It may therefore be truly said, that, as far as concerns the questions which were argued and expressly decided by this Court in the Coles case, its opinion and judgment are at variance with the principles laid down by the Supreme Court of the United States.

It only remains to see whether its judgment can be supported by considerations which were discussed by the Supreme Court in the Chew Hing Lung case, but were not alluded to by this Court in the Coles case.

The ultimate conclusion of the Supreme Court in the Chew Hing Lung case was that the phrase "all preparations fit for use as starch" could not control the denominative mention of tapioca, because it was a phrase of general description, in obedience to the rule that the designation of an article *eo nomine* must prevail over words of a general description which might otherwise include the article specially designated. Speaking of this phrase, the Court said:

> "That paragraph is general in its nature, and provides for a duty upon starch, including in that name all preparations from whatever substance

> produced, fit for use as starch. Any preparation, therefore, which is fit for that use would come within that general description."

The Court evidently regarded the paragraph as "comprehensive enough" to include tapioca flour, fit for use as starch, but held that, although comprehensive enough to include tapioca, it could not do so because it was descriptive as well as comprehensive, the rule being that words of description cannot control denominative mention.

In the Coles case this Court held that the phrase "all coals containing less than ninety-two per cent of "fixed carbon" was a comprehensive one, of sufficient breadth to include anthracite, and for that reason held that it must control the denominative designation of anthracite. Evidently, this conclusion is out of harmony with the opinion of the Supreme Court, if, besides being a comprehensive phrase, it is also a descriptive one in the sense in which "all preparations fit for use as starch" was held by the Supreme Court to be one of general description; and if, in that sense, paragraph 415 of the *Dingley Act* is "general in its nature", although it might otherwise include anthracite coal coming within its general terms, it cannot do so, in the view of the Supreme Court, because anthracite is denominatively designated in the free list.

We thus see that the effect of the decision in the Chew Hing Lung case is to narrow the question of this case to one single consideration: Is paragraph 415

of the *Dingley Act* "general in its nature", "a general description", in the sense in which paragraph 323 of the *Wilson Act* was held by the Supreme Court to be general in its nature and a general description? If it is, then the decision in the Coles case was out of harmony with the opinion of the Supreme Court, and, if it be desirable that the lower Federal Courts should follow the expressed opinions of the Supreme Court, even in cases in which there is no appeal to the Supreme Court, this Court should now, having before it an opinion of the Supreme Court which had not reached it when the decision in the Coles case was rendered, conform its opinion to that of the Supreme Court, and overrule its own decision in the Coles case.

In examining this question the only logical method is to determine first precisely what the Supreme Court meant when it said that paragraph 323 of the *Wilson Act* was general in its nature and a general description; why, for what reason, it so held. Having discovered the reasons which led the Supreme Court to that conclusion, we shall be in a position to learn whether or not, for the same reasons, paragraph 415 of the *Dingley Act* is general in its nature and a general description. And if we find that the reasons which led the Supreme Court to hold that paragraph 323 of the *Wilson Act* was general in its nature and a general description are fully applicable to paragraph 415 of the *Dingley Act*, we shall be forced to conclude that

the decision of the Coles case should be overruled, unless we are prepared to say that the lower Federal Courts should disregard the opinions of the Supreme Courts in cases in which there is no appeal to the Supreme Court.

The reasons leading the Supreme Court to regard paragraph 323 of the *Wilson Act* as general in its nature and a general description are not explicitly set forth in the Court's opinion, but they are to be gathered with sufficient distinctness from what the Court does say, taken in connection with a few obvious considerations touching the nature of tariff legislation, and the history of judicial opinion on that legislation.

The tariff acts denote the subjects of importation with which they deal in three ways, which, for the purposes of this discussion, may conveniently be termed classification, denomination and demonstration.

To *classify*, says Webster, is "to arrange in sets according to some common properties or characters." Classification, then, is the arrangement of things in sets according to their common properties or characters.

To *describe*, says Worcester, is "to define by properties or accidents", and the Standard Dictionary defines a *description* as "a group of attributes or char-
" acteristics present in or constituting a class".

A *classification*, therefore, according to these authorities, is necessarily descriptive, because it denotes the

articles which it groups together by a reference to their common properties, accidents, qualities or characteristics. And, in one of its senses, a description is the equivalent of a classification.

Denomination is the opposite of classification, and proceeds by naming things, by designating them *eo nomine*, without reference to their qualities or description, or to the groups or classes into which they may fall, or to attributes or characteristics which they may have in common with other articles. It is a more specific method of designation than that of classification, and as, logically, the particular must be a limitation upon the general, we have the legal rule of construction, that, as between a general descriptive classification and a denominative designation, the latter shall be deemed to be an exception upon and from the former, or, as the rule is ordinarily expressed, that the denominative designation shall prevail over the general descriptive classification. That this is the sense in which the phrase "general description" is used by the Supreme Court in the Chew Hing Lung case, to wit: a descriptive classification by reference to the qualities of a thing which it possesses in common with other articles in the same class, is manifest from a glance at the cases to which the Court referred (p. 160) as authority for the rule of construction which it applied.

In *Homer* vs. *The Collector*, 1 Wall, 486, the first of the cases cited by the Supreme Court, the conflict was

between a provision for "dried fruit" and one for "almonds" *eo nomine*. It is evident that the term "dried fruit" is a classification pure and simple of all fruits possessing the common quality of being *dried*, and that if it is regarded as a "general description", it must be because "general description" is the equivalent of qualitative classification.

So, in *Reiche* vs. *Smythe*, 13 Wall. 162, cited next by the Court, the conflict was between "all live animals", (a most comprehensive phrase) and "birds". The first is a classification of all animals having the quality of being alive, and yielded to the specific mention of a certain kind of animals.

In *Movius* vs. *Arthur*, 95 U. S. 144, the contrast was between "finished skins" and "patent leather". The first is a classification of all skins having the common quality of being finished; the second is a denominative mention of a certain kind of finished skins.

In *Arthur* vs. *Lahey*, 96 U. S. 112, as in *Arthur* vs. *Morrison*, 96 U. S. 108, the conflict was between the specific mention of articles made of silk by their commercial designation, and a clause covering "all manufactures of silk". The latter was a classification of all articles having the common quality of being made of silk.

Arthur vs. *Rheims*, 96 U. S. 143, presented a conflict between "artificial flowers" a denominative mention, and "manufactures of cotton" a classification of all

articles having the common quality of being made of cotton.

This list of cases illustrating the control of a denominative designation over a clause general in its nature might be largely extended, and in every one of the cases in which the rule was applied it would be found that the general clause, which the Court subjects to the mention of an article *eo nomine*, though variously termed "a general description", (*American Net and Twine Co.* vs. *Worthington*, 141 U. S. 474), "a description" (*Solomon* vs. *Arthur*, 102 U. S. 212), "a general expression" (*Barber* vs. *Schell*, 107 U. S. 620), "descriptive" *Robertson* vs. *Glendenning*, 132 U. S. 159), is essentially a classification of articles by reference to their qualities or material, to the characteristics which they have in common and in reference to which they are grouped, and the conclusion is irresistible that the Supreme Court, in applying the rule of construction established by those cases to the case before it, and in using the same phraseology as had so many times before been used by the Court, intended to hold and did hold that the case before it was of precisely the same complexion as the others, and that the "paragraph of a general nature", which it subjected to the controlling effect of the denominative designation in the free list, and which it termed "a general description", was so because and only because it was a classification of articles by reference to their qualities and characteristics. In this view the Supreme Court held,

although it did not say so in so many words, that the phrase "all preparations fit for use as starch" was a classification in one group of all articles related to each other by their common quality of fitness for use as starch.

Even if there were any doubt that this was what the Court meant by speaking of this phrase as a general description, the doubt would be removed by a consideration of its treatment of the case of *Magone* vs. *Heller*.

We have thus far considered the relative importance and the effect upon each other of two of the modes in which imported articles may be designated by the tariff acts: designation *eo nomine* and descriptive classification. But there is still a third mode of designation, which, for convenience sake, we have termed that of demonstration. By this we mean the mode which the Legislature adopts when it designates articles without reference to their names, or to their relations to other articles with which they may be classed or grouped by reason of qualities or attributes which they possess in common with other articles. This mode of designation is frequently resorted to in the tariff acts, and is quite distinct from either denomination or classification, amounting to a legislative declaration that articles coming within its terms shall be admitted free or subjected to duty, as the case may be, without regard to their names, or their qualities, or their position in a class. By this method of designation a thing is neither described nor named; it is

pointed out, not by reference to its relations to other things, or its commercial appellation, but simply by reference to the objects of its importation or the functions it performs. Thus books imported for the use of the Congressional Library, or documents issued by foreign governments, or articles imported from Porto Rico, or coal stores of American vessels, etc., etc., are exempted from duty, or subjected to a special duty, as the case may be. The designation of these articles is demonstrative. It is not descriptive or denominative. And it is necessarily exclusive of and controls the other modes of designation, because it amounts to an express, positive, substantive legislative enactment in regard to all articles thus pointed out, whatever may be their classification, or their description or their names.

A designation of this demonstrative nature figured in *Magone* vs. *Heller* (150 U. S. 70), in which a very general form of expression, "all substances expressly used for manure", was presented to the Court, in conflict with the denominative mention of "sulphate of potash". In the trial Court (*Heller* vs. *Magone*, 38 Fed. 910) the Court was moved to direct the jury to find for the defendant "on the ground that the im-
" ported article is 'sulphate of potash', and is provided
" for in said tariff act *eo nomine* as 'sulphate of potash',
" a specific expression; and, if otherwise covered by
" the general expression 'all substances expressly used
" for manure', is not therefore provided for under such
" general expression".

It will be observed that the ground of the motion was, that the words "expressly used for manure" were a "general expression" which should, under the rule of *Arthur* vs. *Lahey*, 96 U. S. 112, and the cases there cited, yield to a denominative designation. But the Court declined to accept this view, and denied the motion, saying:

> "The clause here very clearly expresses, and there seems no doubt that by the use of this phrase Congress has plainly said, that all imported substances, whether specially provided for *eo nomine*, or covered by any general language descriptive of their origin or qualities, which subserve the purpose of enriching the soil, should be free."

The Court thus held, that a demonstrative designation like the one before it, must control a denominative mention, or any descriptive classification. On appeal to the Supreme Court the view of the trial Court was adopted and affirmed. It was again urged in that Court (150 U. S. 72), that the imported article was covered by the specific expression "sulphate of potash" rather than by the general expression "expressly used for manure", but the Supreme Court overruled this contention, and held (p. 73) that "by force of the very " clause in question 'all substances expressly used for " manure' must be exempt from duty". This was only another way of saying, with the trial Court, that the clause in question was a positive, substantive enactment affecting articles coming within its terms, whether elsewhere in the act specially named or gen-

erally described or not.

The Supreme Court thus made a clear distinction between the general clause before it and the general clauses which had, in the preceding cases, been made to yield to a mention *eo nomine*. It distinguished between a general expression which should be controlled by a denominative designation, and a general expression which should prevail over a denominative designation. And it is apparent that the essence of the distinction is the difference which exists between a phrase of descriptive classification, such as had figured in the preceding cases, and a phrase, not of description or classification, but of demonstrative force, which *proprio vigore* applies to all articles included by its terms without regard to their qualities, or their description or their classification.

For it is to be observed, that "expressly used for manure" is not a descriptive phrase, nor one referring to the qualities of a thing, nor to its place in a group or class with other things possessing attributes in common with it. It is a phrase essentially similar to "imported for the use of the Congressional library", or "documents issued by foreign governments", or "imported from Porto Rico", or "coal stores of American vessels". It ignores description, quality, material and classification altogether. It applies to all things actually *used* for certain purposes, without regard to the qualities which cause them to be so used.

The distinction, therefore, which was recognized and acted on by the Court, was the one between the qualities causing a thing to be used for a purpose, and the mere fact of such use. If the phrase before the Court had grouped and classified substances by reference to any quality which they possessed in common, it would have been a general descriptive phrase which would have been controlled by a mention of any such substance *eo nomine*; but as it made no attempt at classification or description, nor any reference to the qualities of such substances as come within its terms, the Court treated it as a sweeping enactment attaching to everything, without exception, which by force of the language used could come within its scope.

Perhaps an illustration may make the distinction clearer. If a tariff act should impose a certain rate of duty upon all articles made from the leaf of the tobacco plant, and another rate of duty upon cigars, cigars would be treated as an exception from the more comprehensive clause concerning all articles made from the tobacco leaf, because cigars are mentioned by name, and the more comprehensive clause is one classifying things by a reference to the substance from which they are made. But if a tariff act should relieve from duty all articles imported from Porto Rico, and should impose a duty upon cigars, cigars would not be excepted from the first clause, because the clause is not a classification but a positive legislative enactment of all-controlling force.

That this is the meaning of *Magone* vs. *Heller*, appears more clearly still in the Supreme Court's explanation of it in the Chew Hing Lung decision.

This Court had held in *Wise* vs. *Chew Hing Lung* (83 Fed. 165) that "all preparations fit for use as starch" was a "specific provision", which should prevail over the designation of tapioca *eo nomine*, in the same way and for the same reason as the phrase before the Court in *Magone* vs. *Heller* had been made to control the designation *eo nomine* of sulphate of potash. But the Supreme Court, disagreeing with this Court and reversing its judgment (176 U. S. 161) held that the case was not within the principle decided in *Magone* vs. *Heller*, and, in giving its reason for this conclusion, illuminated the very distinction we are insisting on. Said the Court:

> "If the statute in this case had said that starch was dutiable, including all preparations from whatever substance produced, expressly intended and fit for use as starch, then tapioca flour, if fit and intended for such use, might be dutiable under the paragraph in question, and not be exempt as a form of tapioca. But when the language is, fit for use as starch, it is so much more general, that it is properly qualified by the subsequent paragraph which exempts tapioca, and consequently tapioca flour, one of its commercially known forms."

In other words, if the statute had said that all preparations *intended for use as starch* should be dutiable, then tapioca flour, intended for such use, would be dutiable; but, the language being *fit for use as starch*, it is

qualified by the designation *eo nomine* of tapioca.

The contrast drawn is between the phrase "intended for use as starch", and the phrase "fit for use as starch", and the ruling is that "intended for use as starch is a phrase", which, like the phrase before the Court in *Magone* vs. *Heller*, would control a denominative designation, but that "fit for use as starch" is not like the phrase in *Magone* vs. *Heller*, and is, like the phrases in the cases which preceded *Magone* vs. *Heller*, one of general description, which cannot control a denominative designation.

The *reason* for the distinction thus drawn by the Court is obvious. Fitness for use as starch is a *quality* or characteristic of certain preparations, and "all preparations fit for use as starch" is a descriptive classification of all preparations having the common quality or characteristic of being so fit. "Intended for use as starch", on the other hand, would not be a classification or description at all, because it deals with no quality or characteristic of any preparations or substances, and makes no attempt to group articles with reference to a common quality. It is, therefore, like "all substances expressly used for manure", a positive legislative enactment concerning any such substances as are actually intended for or applied to the use named, without regard to their qualities, and of controlling force as against any denominative or descriptive designation.

It must be evident from what precedes that the question of this case, as of all the cases above alluded to, is one of logic. The rule that a general description shall not prevail over a denominative designation, is, when analyzed, nothing but an expression in legal phrase of a necessary logical principle, that the special and particular must be treated as an exception to the more general and comprehensive. The Supreme Court recognized this when, in *Solomon* vs. *Arthur*, 102 U. S. 212, it said:

> "Logically, the two phrases standing together in the same act or system of laws would be related as follows: 'Goods made of mixed materials, cotton, silk, etc., shall pay a duty of thirty-five per cent; *but if* silk is the component part of chief value, they shall pay a duty of fifty per cent' ".

"*But if*" is a phrase of exception, and the conclusion is the same as the one arrived at by the Supreme Court in the case of *Chew Hing Lung* (176 U. S. 159), where effect was given to all parts of the statute by treating the special denominative designation as an exception from the general language of the paragraph concerning all preparations fit for use as starch. The Supreme Court used the language of the logicians in *Movius* vs. *Arthur*, 95 U. S. 102, when it said:

> "Patent leather, no doubt, is finished skin; but every finished skin is not patent leather",

and a logician would likewise express the proper relations to each other of the clauses here before this Court

by saying:

> "Anthracite, no doubt, is coal containing less than ninety-two per cent of fixed carbon; but not all coal containing less than ninety-two per cent of fixed carbon is anthracite."

The rule, then, both of logic and of law, being that the general shall yield to the specific, it becomes necessary, in construing a tariff act, to determine, of two conflicting clauses, which is the more specific of the two, and the cases above reviewed furnish the test by which this determination shall be made.

In a conflict between a denominative designation and a descriptive classification, the latter is the more general provision and yields to the mention *eo nomine*, which is regarded as the more specific of the two.

In a conflict between a denominative designation and such a provision as "all substances expressly used for manure", the latter is regarded as the more specific and controls. This was recognized by the Supreme Court in the Chew Hing Lung case. In contrasting the phrase "intended for use as starch" the Court said that the latter "is so much more general, that it is " properly qualified by the subsequent paragraph " which exempts tapioca". The conclusion is that " intended for use as starch " would be, like the phrase in *Magone* vs. *Heller*, much more specific, and would, for that reason, control the denominative designation.

We respectfully submit, then, that this Court was

guilty of bad logic, when it decided the Coles case upon the express ground that the phrase "all coals " containing less than ninety-two per centum of fixed " carbon " is comprehensive enough to include anthracite as well as any other kind of coal, whether specifically named or not. Mere comprehensiveness is the note of generality, and a comprehensive phrase is ordinarily regarded as so general that it is controlled by a denominative designation. Said the Court in *Arthur* vs. *Morrison*, 96 U. S. 109:

> "The argument of the Government is, that the statute in question is a comprehensive one, intended to include all articles made of silk."

And yet, in spite of the comprehensiveness of the phrase, nay, it may be said, because of its comprehensiveness, it was not allowed to prevail over the designation *eo nomine* of an article which it was, in terms, broad enough to comprehend.

So in *Arthur* vs. *Rheims*, 96 U. S. 144:

> "The general words of the act of 1872, no doubt, are sufficiently comprehensive to embrace the case before us."

But it was held that the comprehensive words of the statute must yield to a specific provision *eo nomine*.

It must now be evident to the Court that the one question of this case is whether the clause, " all coals " containing less than ninety-two per centum of fixed " carbon" is, without regard to its general or comprehensive *form*, in essence, and upon a comparison with

the denominative designation of anthracite in the free list, more general or more specific, than the denominative designation. Is it a general description within the sense and rule of Chew Hing Lung's case and the cases preceding *Magone* vs. *Heller*, and so controlled by the mention of anthracite *eo nomine;* or is it a specific, all-controlling provision like the one before the Court in *Magone* vs. *Heller*, and so not to be con trolled or excepted from by the denominative mention of anthracite?

Fortunately, the solution of this question is not a matter of mere guess work, but is to be reached by the application of a sure and simple test, which is afforded by the cases we have already considered.

And the test is this. If the clause, "containing less "than ninety-two per centum of fixed carbon", is a descriptive one, dealing with the qualities, attributes and characteristics of substances, and classifying them in accordance with and by reference to their qualities, attributes and characteristics, it is a "general description" within the meaning and rule of the decision in Chew Hing Lung's case and the other cases cited in that decision, and must yield to the denominative mention of anthracite. If, on the other hand, the clause does not deal with the qualities of things, it is a "specific provision" like the one in *Magone* vs. *Heller*, and controls the mention of anthracite in the free list.

Applying this test, it seems to us that there can be

no doubt about the essential character of the clause, and that it *classifies* coals with reference to their quality or characteristics of per centage in fixed carbon, so that all coals, whether bituminous, or lignite, or anthracite, or of any other sort, having the requisite percentage, are grouped together. In this view, percentage in fixed carbon is a *quality* of coal, just as fitness for use as starch is a quality of certain preparations, or being made of certain materials, linen, silk, cotton or worsted, is a quality of certain manufactured articles. Can there be any question that percentage in carbon is a quality of coal, in the same way as percentage in alcohol is a quality of wine, or percentage in saccharine matter is a quality of beets? But a wine is described, and can only be described, by reference to its qualities, including its age, color, aroma, taste, specific gravity and percentage in alcohol. A classification of wines would have to be by reference to one or more of these qualities, and so would, as we have seen, be a descriptive classification or a "general description". In like manner a kind of coal is described, and can only be described, by reference to its qualities, including its density, mode of fracture, properties of ignition, caloric efficiency, cleanness, specific gravity, and percentage in carbon. A classification of coals must necessarily be by reference to one or more of these qualities, and any such classification is, of equal necessity, descriptive, or a "general description" within the meaning of the Chew Hing Lung decision and the cases there cited and relied on, and, being a

mere general description, must, within the principle of that decision, yield to the denominative designation of anthracite, which is to be regarded as an exception to and not included in the comprehensive terms of the description.

The argument here presented has so far in the course of this litigation not been met. It was passed without notice in this Court's decision in the Coles case, which, as we have seen, went off upon the proposition, that the clause referring to all coals containing a certain percentage of carbon must apply to anthracite because it was broad enough in its explicit terms to include anthracite. But the question whether the clause is not essentially a descriptive one, which was presented to this Court on page 12 of the appellant's brief in that case, was not even alluded to in the opinion of the Court, and yet in view of the last decision of the Supreme Court, we find that it is the one vital question, which must be answered, if this case is to be treated according to the methods which were applied by the Supreme Court to the determination of the tapioca case.

This Court, in the Coles case, spoke of the appellant's argument as ingenious, able, earnest and difficult to answer, but we humbly submit that to so speak of it was to stigmatize it, not to answer it. We have presented here our reasons in support of the proposition that the clause in question is a general description within the sense of the Supreme Court's use of that term in the

Chew Hing Lung decision, and we submit that the argument can only be met by the production of reasons more cogent still why it should not be so considered. If it is not a general description, it behooves counsel for the government to state precisely the reasons why it is not, but this counsel has so far failed to do, and this Court has omitted to do. The fact that the argument on this point has not yet been answered suggests the possibility of its being unanswerable and therefore true.

This discussion will have been in vain if it has not prepared us to take a clearer view of the decision in the Coles case, and to perceive with distinctness the error into which this Court there fell. An analysis of the opinion discloses that the Court gave great weight to the words "not specially provided for in this act", which were regarded as a limitation upon the otherwise positive declaration that anthracite should be free of duty. Then, in looking for a provision in the act applicable to anthracite which might respond to this limitation, the Court disregarded the plain meaning of the word "specially", and recognized as a special provision for anthracite a clause in which anthracite is not named, and which could only be taken to include anthracite by reason of its being a general provision and not a special provision at all. It is evident that the Court was led to this departure from the established rule of construction in regard to the effect of denominative designation upon general descriptive clauses in a

tariff act by its anxiety to give effect to what it conceived to be the intention of Congress. This Court was apparently impressed by the historical fact that the Dingley Act changed the condition of the tariff law regarding coal by the contemporaneous amendment of both the duty list and the free list. In the duty list was inserted the clause concerning percentage of carbon, which was new to the tariff provisions, and in the free list was inserted the n. s. p. f. clause, which had not theretofore appeared in connection with the word "anthracite". The Court concluded that a change in the laws was intended, and that the precise change effected was the imposition of a duty upon all coal containing less than a certain percentage of carbon, including anthracite.

It might seem, at first blush, that Congress, by this simultaneous amendment, intended that the added words in 523 should refer to the clause concerning percentage in fixed carbon in 415. But, giving due weight to this consideration, it is submitted that what Congress actually did or intended to do must, after all, be gathered from the construction, in accordance with legal principles, of the language actually used. If Congress intended to amend the law so as to make percentage in carbon control the specific mention of anthracite in 523, it should have used language which would produce that effect. If Congress failed to use language sufficient, as a matter of law, to produce that effect, it failed in its intention. The language must

speak for itself and cannot be helped out by a guess as to the intention of Congress which was not properly expressed.

One other reason was given by this Court for its decision in the Coles case, which, for completeness, should now be alluded to. It was said (100 Fed. 446), that the views expressed by the members of Congress might be examined for the purpose of shedding light on the intention of the lawmakers.

To determine the meaning of a statute ambiguous on its face Courts may look to the history of the times (*Preston* vs. *Browder*, 1 Wheat. 115), and the general situation intended to be met and regulated (*Jennison* vs. *Kirk*, 98 U. S. 453), and may refer to the history of the act in the Legislature and the character and mode of its amendment prior to its enactment (*Blake* vs. *Natl. Banks*, 23 Wall. 307), *but can not look to the expressions of individual legislators in debate as indicating the intent of the Legislature.* The Supreme Court has frequently laid down this doctrine.

Thus in *Aldridge* vs. *Williams*, 3 How. 9 (1845), Mr. Chief Justice Taney says (p. 24):

> "In expounding this law, the judgment of the Court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will

> of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

In *U. S.* vs. *Union Pacific R. R. Co.*, 91 U. S. 72 (1875), Mr. Justice Davis says (p. 79):

> "In construing an Act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge* vs. *Williams*, 3 How. 24; *Preston* vs. *Browder*, 1 Wheat. 120."

In *American Net and Twine Co.* vs. *Worthington*, 141 U. S. 468 (1891), Mr. Justice Brown says (pp. 473–74):

> "While the statements made and the opinions advanced by the promoters of the act in the legislative body are inadmissible as bearing upon its construction, yet reference to the proceedings of such body may properly be made to inform the Court of the exigencies of the fishing interests and the reasons for fixing the duty at this amount."

In the recent case of *United States* vs. *Trans-Missouri Freight Association*, 166 U. S. 290, Mr. Justice

Peckham affirms this rule, and states the reason for it as follows (p. 318):

> "There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States* vs. *Union Pacific Railroad Company*, 91 U. S. 72; *Aldridge* vs. *Williams*, 3 How. 9, 24, Taney, Chief Justice; *Mitchell* vs. *Great Works Milling & Manufacturing Company*, 2 Story, 648, 653; *Queen* vs. *Hertford College*, 3 Q. B. D. 693, 707.
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> "The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

The doctrine as thus stated is expressly affirmed in *Dunlap* vs. *U. S.*, 173 U. S. 65, 75.

In *Mitchell* vs. *Great Works Milling & Mfg. Co.*, 2 Story 648 (1843), Mr. Justice Story in considering the interpretation of the Bankruptcy Act of 1841, enunciates this doctrine and the reasons therefor in the plainest manner, as follows (p. 653):

> "What passes in Congress upon the discussion of a bill can hardly become a matter of strict judicial inquiry; and if it were, it could scarcely be affirmed that the opinions of a few members ex-

pressed either way, are to be considered as the judgment of the whole House, or even of a majority. But, in truth, little reliance can or ought to be placed upon such sources of interpretation of a statute. The questions can be, and rarely are, there debated upon strictly legal grounds, with a full mastery of the subject and of the just rules of interpretation. The arguments are generally of a mixed character, addressed by way of objection, or of support, rather with a view to carry or defeat a bill, than with the strictness of a judicial decision. But if the House entertained one construction of the language of the bill, *non constat*, that the same opinion was entertained either by the Senate or by the President; and their opinions are certainly, in the matter of sanction of law, entitled to as great weight as the other branch. But, in truth, courts of justice are not at liberty to look at considerations of this sort. We are bound to interpret the act as we find it, and to make such an interpretation as its language and its apparent objects require. We must take it to be true that the Legislature intend precisely what they say, and to the extent which the provisions of the act require, for the purpose of securing their just operation and effect. Any other course would deliver over the Court to interminable doubts and difficulties, and we should be compelled to guess what was the law from the loose commentaries of different debates, instead of the precise enactment of the statute."

Jennison vs. *Kirk*, 98 U. S. 453, goes, perhaps, as far as any case in the Supreme Court on the subject. There Mr. Justice Field cites (p. 459) the remarks of a Senator in debate upon the act under consideration before its enactment, as indicating the nature of the situation for which the act was intended to provide, but

expressly limits their application to that sole purpose, saying (pp. 459–60):

> "These statements of the author of the act in advocating its adoption cannot of course control its construction where there is doubt as to its meaning."

In *Grace* vs. *Collector of Customs*, 79 Fed. 320, this Court, speaking through Judge Hawley, said, that in construing any Act of Congress, in order to ascertain the reason for, as well as the meaning of, particular provisions in it, the views of individual members in debate cannot be considered; and cited with approval this language of Judge Field in *Leese* vs. *Clark*, 20 Cal. 389:

> "It is evident that the opinions expressed by individual legislators upon the subject and effect of particular provisions of an act under discussion are entitled to very little weight in the construction of the act. The intention of the Legislature must be sought in the language of the act, and the object expressed or apparent on its face, and not by the uncertain light of a legislative discussion."

The Supreme Court *has* held that the Journals of the Houses of Congress can be consulted to learn the history of the amendment and passage of a law.

If this Court had consulted the Journals instead of the Debates, it would have found that the *Dingley Bill*, as it came from the House, where it originated (H. R. 379), imposed a duty of 75 cents upon coal, bituminous and shale, by its section 405.

And in its free list (section 504) exempted "coal, anthracite and coal stores of American vessels".

The Senate amended the bill, not only by introducing the words, "and all coals containing less than 92 per cent of fixed carbon", and lowering the rate to 67 cents, but also amended the free list by striking out anthracite altogether.

So that Mr. Vest and Mr. Allison, in the remarks relied on by this Court, were speaking of the act as originally amended by the Senate, which by a general description, imposed a duty on anthracite coal in common with all other coal, and which omitted anthracite from the free list by striking out the special provision of the House for its exemption by name.

The bill went into conference and the House agreed to the amendment by the Senate of paragraph 405, now become 415, but not to paragraph 504, as amended, now become paragraph 523. On the contrary, it put back anthracite on the free list, and though the words "not specially provided for in this act" were added to the clause, the House conferees formally reported to the House (*Cong. Rec.*, July 19, 1897, 9, 3083):

> "The free list as it passed the House is in the main adopted, except that bolting cloths and several kinds of essential oils have been added."

The same report, under the head of "Sundries", says:

> "This schedule remains substantially the same as it passed the House. Coal, however, is reduced

to 67 cents per ton, and coal slack or culm to 15 cents per ton, as proposed by Senate Amendment."

We submit, with a degree of respect for this Court which is equal to our confidence in our own position that the foregoing discussion demonstrates two things:

FIRST. The reason given by this Court in the Coles case for regarding paragraph 415 of the *Dingley Act* as a special provision for anthracite coal containing less than ninety-two per cent of fixed carbon is unsound. That that paragraph is comprehensive enough to include anthracite coming within its terms is not a reason for holding that it does include anthracite, because mere comprehensiveness is not the test. Every general description is comprehensive, but it is established by an unbroken line of authority, that a mere description, however comprehensive, must yield to a designation of an article *eo nomine*.

SECOND. The reason given by the Supreme Court in the Chew Hing Lung case for regarding paragraph 323 of the *Wilson Act* as a general description, and not a special provision for tapioca applies in full force to paragraph 415 of the *Dingley Act*. "All coals " containing less than ninety-two per centum of fixed " carbon", therefore, is a clause of a general nature, a general description, a classification of coal by refer-

ence to a quality of coal, one of its chemical attributes common to it and many other articles (all other coals), and not a demonstrative designation or a specific provision in any sense.

For this reason it must yield to the denominative designation of anthracite in paragraph 523.

It is submitted that the judgment in this case should be reversed and the cause remanded with directions to the Court below to enter judgment upon the findings in accordance with the prayer of the petition.

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